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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises	WC Docket No. 04-242

PETITION OF VERIZON FOR DECLARATORY RULING OR, ALTERNATIVELY, FOR INTERIM WAIVER WITH REGARD TO BROADBAND SERVICES PROVIDED VIA FIBER TO THE PREMISES

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June 28, 2004

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Verizon's Petition for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises	WC Docket No. 04-_____

PETITION OF VERIZON FOR DECLARATORY RULING OR, ALTERNATIVELY, FOR INTERIM WAIVER WITH REGARD TO BROADBAND SERVICES PROVIDED VIA FIBER TO THE PREMISES[1]

In this petition, Verizon seeks a declaratory ruling confirming that, until the Commission completes its ongoing review of what regulations, if any, should apply to broadband services, Verizon may offer those of its broadband services that are provided via fiber to the premises ("FTTP") in the same manner that cable companies offer broadband services via cable modem. If for any reason the Commission concludes that it cannot provide such a declaration, then it should waive its rules for FTTP broadband to the same extent that it has granted a waiver for cable modem service. Verizon urgently needs this clarification because it has already begun its deployment of next-generation FTTP infrastructure and plans to begin offering an attractive

[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., which are identified in Exhibit B of the attached Memorandum in support hereof.

combination of voice, video, and data services using this new infrastructure in less than two months.

Although the Commission has not yet specifically addressed the appropriate regulatory treatment for broadband services offered via FTTP, the Commission *has* on one prior occasion addressed the appropriate regulatory treatment for broadband services offered by a company that also offers video and voice services over its network. In its *Cable Modem Declaratory Ruling*,[2] the Commission granted both declaratory relief and a waiver to permit cable modem service to be provided without being subject to key aspects of the Commission's common-carrier rules that, if applied, would require those serviced to be offered separately under tariff and at cost-based rates, terms, and conditions. As a result, those services may be provided on individually negotiated terms, without tariffs and without cost justification. As explained in detail in the accompanying memorandum, Verizon plans to offer its FTTP broadband services under circumstances that parallel those at issue in the *Cable Modem Declaratory Ruling*. Specifically, like the companies at issue there, Verizon intends to provide video, high-speed Internet access, and voice services over its FTTP network, and to obtain cable franchises for those multichannel video offerings that arguably are subject to the franchise obligation under Title VI of the Communications Act. Under these circumstances, the Commission should issue a declaration confirming that Verizon's FTTP broadband services are subject to the same regulatory treatment as cable modem service.

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[2] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4847-48, ¶ 95 (2002) ("*Cable Modem Declaratory Ruling*"), *vacated in part*, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petitions for certiorari pending*.

In the alternative, to the extent that the Commission determines that waivers are necessary in order to create a level regulatory playing field for FTTP broadband services and cable modem services until the Commission has completed its consideration of appropriate rules for broadband services, then it should grant such waivers as may be necessary. Such relief while permanent rules for a new service are under consideration is fully consistent with past Commission practice.

Simultaneously with this petition, Verizon is submitting a conditional petition for forbearance, which seeks interim forbearance from Title II regulation for broadband services provided via FTTP, to the extent that the Commission determines that such forbearance is needed in order to provide the requested relief.

A memorandum of points and authorities in support of both of these petitions is attached hereto and incorporated herein by reference.

Respectfully submitted,

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June 28, 2004

ATTACHMENT

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In the Matter of Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises	WC Docket No. 04-_____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIZON'S PETITION FOR DECLARATORY RULING OR INTERIM WAIVER AND CONDITIONAL PETITION FOR FORBEARANCE WITH RESPECT TO BROADBAND SERVICES PROVIDED VIA FIBER TO THE PREMISES

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIZON'S PETITION FOR DECLARATORY RULING OR INTERIM WAIVER AND CONDITIONAL PETITION FOR FORBEARANCE WITH RESPECT TO BROADBAND SERVICES PROVIDED VIA FIBER TO THE PREMISES[1]

Introduction and Summary

Verizon seeks a declaratory ruling confirming that, until the Commission completes its ongoing review of what regulations, if any, should apply to broadband services provided via fiber to the premises ("FTTP"), Verizon may offer these services in the same manner that cable companies offer broadband services via cable modem – namely, without being subject to the Commission's rules that would require the services to be provided separately under tariff on cost-based terms and conditions, and thus with the option to provide broadband transmission to Internet Service Providers ("ISPs") on terms and conditions negotiated on an individual-case basis. In its *Cable Modem Declaratory Ruling*,[2] the Commission has *already* determined that high speed Internet access offered by a company that also provides cable service regulated under Title VI of the Communications Act may be provided pursuant to individualized wholesale contracts with no obligation to file tariffs, and that this is equally true where that company also provides telecommunications services subject to Title II. These key determinations survived the Ninth Circuit's decision that invalidated other aspects of the Commission's order; indeed, they were expressly left in place by the Ninth Circuit. This combination of high-speed Internet access with video service is exactly what Verizon proposes to offer in its FTTP roll-out. The Commission should now declare that its determinations in the *Cable Modem Declaratory Ruling*

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[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., which are identified in Exhibit B hereto.

[2] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), *vacated in part*, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petitions for certiorari pending*.

apply to FTTP broadband as well. To the extent that the Commission concludes that further interim forbearance or rule waivers are necessary in order to provide temporary regulatory parity between FTTP broadband and cable modem service while the ongoing rulemakings are pending, the Commission should grant the needed interim forbearance or waivers as well.

Verizon must request this temporary relief because its FTTP deployment is well underway: Verizon has already announced the location of its first FTTP deployment (in Keller, Texas), and it plans to announce additional locations soon, with the goal of offering FTTP in parts of nine states, passing one million homes, by the end of 2004. The Commission has been considering what regulations, if any, should apply to these broadband services since at least December of 2001, when it launched a trio of related rulemakings to determine the appropriate deregulatory framework for broadband services provided by telephone and cable companies.[3] Verizon hoped and anticipated that the Commission would have established an appropriate regulatory framework for broadband services in general before Verizon began offering FTTP broadband to its customers. With the first commercial offering of broadband service over an FTTP network targeted to be available in less than two months' time, however, it now seems likely that the Commission will not have ruled on the regulatory treatment of FTTP broadband before these next-generation broadband services become a reality for Verizon customers.

Verizon plans to use its new FTTP infrastructure to offer an attractive package of voice, multichannel video programming, and high-speed Internet access. Verizon is obtaining local cable television franchises for its video offerings that arguably fall within Title VI of the

[3] *See* Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001); Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband Classification Proceeding*"); *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798 (2002).

Communications Act and thus is acting in that capacity as a cable company. The high-speed Internet access services offered over this network will provide speeds of up to 30 Mbps – approximately 10 to 20 times faster than current-generation DSL or cable modem services. The *slowest* broadband connection Verizon expects to offer via FTTP will be about three times faster than broadband speeds commonly available via DSL today using traditional copper loops.[4] With respect to its voice services, Verizon expects to continue offering service under its existing tariffs.

The Commission should declare that FTTP broadband benefits from the regulatory determinations already made for cable modem service. Although the Commission has not yet specifically addressed the regulatory status of broadband services in the context of the FTTP architecture at issue here, it *has*, on one prior occasion, addressed the rules governing broadband services offered by a company that offers high-speed Internet access together with cable video and voice services over its network. Specifically, the Commission addressed this issue in the context of cable modem service in its *Cable Modem Declaratory Ruling.* That order contained three key determinations. *First*, the Commission declared that cable modem service is properly classified as an information service and not a common-carrier telecommunications service within the meaning of the Telecommunications Act of 1996. (The Ninth Circuit subsequently reversed this first determination in *Brand X Internet Services* – though its decision has been stayed – but the court left intact the remaining two determinations, which correspond to the relief Verizon is seeking in its present petitions.) *Second*, to the extent that they might be deemed to apply to cable modem service, the Commission on its own motion waived the common-carrier rule that

[4] *See* Verizon News Release, *Verizon, in Historic First, Begins Large-Scale Rollout of Advanced Fiber-Optic Technology With Keller, Texas, Deployment; Announces Plans for Offering New Services* (May 19, 2004), *available at* http://newscenter.verizon.com/proactive/newsroom/ release.vtml?id=85137.

would otherwise require cable companies to unbundle the transmission component of their information services and offer it on a stand-alone basis under tariff at cost-based rates. *Third*, the Commission determined that if cable companies offer broadband transmission to ISPs, they may do so on an individual-case basis rather than a common-carriage basis.

As described above, Verizon plans to offer its high speed Internet access service under circumstances that parallel those at issue in the *Cable Modem Declaratory Ruling*. The Commission should confirm that the same rulings apply to Verizon's FTTP broadband offerings. In particular, the Commission should declare that Verizon, like other companies that offer video services regulated under Title VI as well as voice services regulated under Title II, may offer stand-alone broadband transmission via FTTP without being required to provide those services separately under tariff at cost-based rates, and may instead do so on individually negotiated terms.[5]

If necessary, the Commission should grant interim waivers of its requirement to offer a stand-alone broadband transmission service on a common-carrier basis, as well as its tariffing and cost-justification rules or, alternatively, forbear from Title II regulation for FTTP broadband. If the Commission for any reason concludes that the *Cable Modem Declaratory Ruling* does not extend to FTTP broadband, or that additional steps are needed to afford complete relief, then the Commission should waive or forbear from whatever requirements might otherwise prevent Verizon from offering FTTP video programming and FTTP broadband services under the regulatory framework already in place for other cable companies – at least until the Commission completes its pending broadband proceedings.

[5] Verizon expects to negotiate contracts tailored to individual customer needs and desires. In doing so, Verizon should be free to experiment with innovative, non-cost-based pricing schemes of the type that cable modem companies and Internet companies are already using – for example, rates based on a percentage of the customer's revenue generated using the service.

It is worth emphasizing that the relief sought is limited in scope: waivers are sought here only for broadband transmission (not voice or video services), and only for FTTP, the deployment of which is in its infancy. There is no risk of harm from these temporary waivers, which would merely provide the same relief to FTTP that the Commission has already extended to cable modem services. Indeed, the same key reason for granting relief for cable modem service applies equally here. One assumption underlying traditional common-carrier requirements – namely, that there is only one wire to the premises, and the local telephone company controls it – is not true in this context. Not only do cable companies and other intermodal broadband competitors offer other wires (and wireless paths) to the premises, but the Commission has also found in its *Triennial Review Order*[6] that incumbent LECs like Verizon have no special advantages when it comes to FTTP deployment. The Commission has previously granted temporary waivers of regulations in similar circumstances to preserve an environment of reduced regulation pending the outcome of proceedings to establish permanent rules. It makes eminent sense to do so again here.

To the extent that forbearance from Title II requirements is needed in order to provide the requested interim relief, the present market situation in broadband clearly meets the forbearance standards that the Commission has previously established. Section 10(a) of the Communications Act provides that the Commission "shall forbear from applying any regulation or any provision of this Act" to any "telecommunications carrier" if it determines that: (1) enforcement "is not necessary to ensure that the charges, practices, classifications, or regulations" by that carrier for a telecommunications service "are just and reasonable and are not unjustly or unreasonably

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

discriminatory"; (2) enforcement is not "necessary for the protection of consumers"; and (3) forbearance would be "consistent with the public interest." 47 U.S.C. § 160(a). The Commission has already tentatively concluded that forbearance from Title II regulation of cable modem service would satisfy all three requirements "because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."[7] Precisely the same is true of FTTP broadband.

To sum up, consistent with Congress's directives to promote the deployment of advanced telecommunications capability and to preserve a free market for the Internet and other interactive computer services, unfettered by federal or state regulation, the Commission should confirm that FTTP broadband benefits from the determinations in the *Cable Modem Declaratory Ruling* that permit companies to negotiate terms for broadband transmission on an individual-case basis, rather than being obliged to offer the transmission on a common-carrier basis, under tariff, at cost-based rates. In the alternative, the Commission should, on an interim basis, waive or forbear from any Title II requirements that might otherwise prevent FTTP broadband transmission from being offered on individually negotiated terms, without tariffs or cost justification, until the appropriate regulatory treatment of FTTP broadband has been determined.

Discussion

I. The Commission Should Confirm that the Waivers and Determinations in the *Cable Modem Declaratory Ruling* Apply to FTTP Broadband Transmission

The Commission has already issued waivers allowing cable companies to offer high speed Internet access free of key aspects of its rules adopted under Title II that would require these services to be offered separately under tariff on cost-based terms and conditions. The

[7] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.

Commission should now confirm that these previous waivers apply to Verizon under the circumstances where it will be providing video, high-speed Internet access, and voice service via FTTP, and where its multichannel video offerings will be subject to Title VI, all of which parallels the way that cable companies provide services over their networks.

The Commission plainly has the authority to grant the requested declaration. Section 1.2 of the Commission's General Rules of Practice and Procedure authorize the issuance of declaratory rulings "terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. The Commission has previously granted declaratory relief in order to clarify the regulatory classification of a new service offering. *See, e.g.*, Memorandum Opinion and Order, *Petition for Declaratory Ruling That Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004). In fact, the Commission did precisely that with respect to cable modem service, where it granted both a declaration and waiver in the context of a declaratory ruling proceeding.

As noted above, Verizon will use its FTTP infrastructure to offer a package of very high-speed Internet access (at speeds impossible to achieve with existing cable or DSL technologies), together with voice and video programming. Verizon is in the process of obtaining franchises in connection with video offerings that arguably fall within Title VI of the Communications Act, and is, in that capacity, acting as a cable company.[8] In fact, a major goal of Verizon's FTTP deployment is to bring added competition to incumbent cable companies in the multichannel video programming distribution market, in a manner that is not possible using traditional twisted-

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[8] Current plans are for the video service in Verizon's initial deployment area to follow soon after the launch of high speed Internet access service.

pair copper infrastructure. This competition is much needed, since cable television subscription prices have risen at twice the rate of inflation over the past decade.[9]

Keller, Texas, where Verizon has announced its first FTTP deployment, showcases the potential for increased competition in video, broadband, and voice markets. Just as Verizon is upgrading its network to challenge the incumbent cable company (Charter Communications) in the video and broadband markets, Charter has begun to offer voice telephony in direct competition with traditional telephone companies in nearby areas and has announced ambitious plans for rapid expansion.[10]

Broadband Internet access via FTTP will be offered in conjunction with – indeed, intertwined with – Verizon's multichannel video programming. Verizon's all-optical FTTP pathway will use three light beams, and *all three* beams will be used to support Verizon's video offering. One of the three beams will be devoted to downstream video delivery; the second beam will carry voice, data, and instructions upstream from the customer and will be used for controlling various video features; the third beam will carry voice, data, video-on-demand programming, and certain niche video channels downstream to the customer. *See* Declaration of Anthony Zecha ¶ 7 (Exhibit A hereto).

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[9] *See* Tenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1610-11, ¶ 10 (2004) ("According to the Bureau of Labor Statistics, between year-end 1993 and the end of June 2003, the Consumer Price Index ('CPI'), which measures general price changes, increased approximately 25.5%, while cable prices, also measured as a subcategory of the CPI, rose approximately 53.1%. Between June 2002 and June 2003, the cable price component of the CPI rose 5.1% compared to a 2.1% increase in the overall CPI.").

[10] *See* Carl Vogel, President & CEO, Charter Communications, *Presentation at the Janco Partners, Inc. 9th Annual Media & Telecommunications Conference* at 12-13 (Mar. 17, 2004), *available at* http://media.corporate-ir.net/media_files/nsd/chtr/presentations/chtr_031604.pdf. At the same time, an independent fiber overbuilder (OneSource Communications) is deploying its own FTTP infrastructure in the Keller area in order to offer another bundle of voice, video and broadband data services. *See* OneSource Communications, *OneSource Communications Service Area*, *available at* http://www.1scom.com/main/locations.php.

Although the Commission has not yet specifically addressed the appropriate regulatory treatment for broadband services in the context of the FTTP architecture, it *has* on one prior occasion addressed the appropriate regulatory treatment for broadband services offered by a company that offers high-speed Internet access together with cable video and voice services over its network.

In the *Cable Modem Declaratory Ruling*, the Commission reached three key conclusions:

First, it concluded that cable modem service offered to end users is an information service, and not a common-carrier telecommunications service, as those terms are defined in the Telecommunications Act of 1996.[11] It found that "cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering."[12] It also found that cable modem service does not include an offering of telecommunications service to subscribers. According to the Commission, the telecommunications component is not separable from the data-processing capabilities of the service, and the cable operator that provides cable modem service over its own facilities "is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service."[13] The Ninth Circuit overturned the Commission's conclusion on this issue in the *Brand X Internet Services* decision, although the mandate has been stayed pending disposition by the Supreme Court of petitions for certiorari.

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[11] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4822-23, ¶ 38.

[12] *Id.*

[13] *Id.* at 4824, ¶ 41.

Second, the Commission concluded that, in case the courts disagree with the first conclusion, it would waive its *Computer II/III* rules[14] (which expressly require carriers to offer the transmission component of their information services separately under tariff, at cost-based rates).[15] The Commission reasoned that it did not matter that some cable operators were also offering local exchange telephone service as common carriers, over the same cable facilities that are used to provide cable modem service. Applying tariff requirements to cable modem providers that offer telephony services create a regulatory regime "applicable only to some operators," and it would be more appropriate to address the issue "on a national basis involving all those Title VI cable systems that choose to offer cable modem service, rather than to divide and treat separately those that also have a common carrier local telephony offering."[16] The Commission also concluded that applying the *Computer II/III* rules "would also disserve the goal of Section 706 that we encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[17] Finally, the Commission tentatively concluded, subject to public notice and comment, that it would forbear from applying Title II regulations to cable

[14] *See* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 F.C.C.2d 384 (1980) ("*Computer II*"); Report and Order, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services*, 14 FCC Rcd 4289 (1999) ("*Computer III*").

[15] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825-26, ¶ 45.

[16] *Id.* at 4826, ¶ 46.

[17] *Id.* at 4826, ¶ 47 (internal quotation marks omitted).

modem service.[18] On appeal, the Ninth Circuit did not disturb this aspect of the Commission's order, and it remains intact and in effect.[19]

Third, the Commission concluded that, if cable companies offer broadband transmission to ISPs, they may do so by negotiating separate agreements on an individual basis and on terms that are tailored to the specific needs of their customers.[20] The Commission expressly rejected the argument that cable operators were "common carriers" when they provided broadband transmission services to ISPs, citing with apparent approval statements by cable companies that their continued deployment of cable modem service could be delayed or even halted if they were subjected to common-carrier regulations.[21] The Commission stated plainly that "[t]o the extent that AOL Time Warner is making an offering of pure telecommunications to ISPs, it is dealing with each ISP on an individualized basis and is not offering any transmission service indiscriminately to all ISPs. Thus, such an offering would be a private carrier service, not a 'telecommunications service.'"[22] On appeal, the Ninth Circuit again expressly *declined* to consider "the validity of the FCC's determination that AOL Time Warner offers cable

[18] *See id* at 4847-48, ¶ 95 (tentatively concluding that forbearance "would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing," so that "enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory").

[19] *See Brand X Internet Servs.*, 345 F.3d at 1132 n.14 (expressly declining to consider "the validity of the FCC's . . . waiver of the *Computer II* requirements for cable companies who also offer local exchange service").

[20] *See, e.g., Cable Modem Declaratory Ruling* 17 FCC Rcd at 4830-31, ¶ 55 (noting that if "cable providers elect to provide pure telecommunications to selected clients with whom they deal on an individualized basis, we would expect their offerings to be private carrier service").

[21] *See id.* at 4826, ¶ 47 & n.176.

[22] *Id.* at 4830-31, ¶ 55 (footnote omitted).

transmission to unaffiliated ISPs on a private carriage basis,"[23] so this aspect of the order likewise remains intact and in full effect.

The *Cable Modem Declaratory Ruling* is part of a trio of rulemaking proceedings that the Commission has undertaken to determine the appropriate regulatory treatment of broadband services offered by telephone companies and cable companies, respectively.[24] The first of these proceedings was initiated in December of 2001, with the others following shortly thereafter, and all three remain under consideration today. Until the Commission has determined an appropriate regulatory framework for broadband generally, the Commission should confirm that FTTP broadband services such as those described here are subject to the same regulatory treatment as cable modem services. Doing so will promote competition by creating a level regulatory playing field with the incumbent cable operators, who currently control nearly two thirds of mass-market broadband lines, and fully *85%* of mass-market lines offering data transmission at more than 200 kpbs in both directions.[25] As the U.S. Department of Justice has long recognized, "[a]pplying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals."[26] Furthermore, by treating FTTP broadband like cable modem service

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[23] *Brand X Internet Servs.*, 345 F.3d at 1132 n.14. Although the court in this passage spoke of "unaffiliated ISPs," the Commission did not limit its analysis only to unaffiliated ISPs. *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4830-31, ¶ 55.

[24] *See* Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001); *Wireline Broadband Classification Proceeding*, 17 FCC Rcd 3019 (2002); *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798 (2002).

[25] *See* Industry Analysis & Technology Division Report, *High-Speed Services for Internet Access: Status as of December 31, 2003* at Tables 3 & 4 (FCC Wireline Competition Bureau June 2004).

[26] Reply Comments of the U.S. Department of Justice, *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, at 26 n.42 (FCC filed Sept. 28, 1990).

(*i.e.*, by not requiring common-carrier tariffs) for the time being, the Commission avoids prejudging the ultimate issue of what regulatory framework is appropriate.

Moreover, it would be unsound policy to apply the burdensome tariffing, cost-justification, and common-carrier requirements to FTTP broadband before deciding whether those rules and requirements serve any purpose. As the Commission itself has repeatedly recognized, tariffing and cost-justification requirements affirmatively harm competition if they are imposed in a competitive environment. *See, e.g.*, Notice of Proposed Rule Making, *2000 Biennial Regulatory Review: Policy and Rules Concerning the International, Interexchange Marketplace*, 15 FCC Rcd. 20008, 20020-21, ¶ 18 ("requiring or permitting non-dominant carriers . . . to file tariffs impedes vigorous competition in the market for interexchange services by: (1) removing the incentives for competitive price discounting; (2) reducing or eliminating carriers' ability to make rapid, efficient responses to changes in demand and cost; (3) imposing costs on carriers that attempt to make new offerings; and (4) preventing or discouraging consumers from seeking or obtaining service arrangements specifically tailored to their needs"); Further Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 F.C.C.2d 445, 478-79, ¶ 87 (1981) ("Applying the tariff requirements to competitive entities, however, has worked the perverse effect of imposing a measure which (1) is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation."); *see also MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 233 (1994) (expressing the Court's "considerable sympathy" with the propositions that, in competitive markets, tariff "filing costs raise artificial barriers to entry and that the publication of rates facilitates parallel pricing and stifles price competition").

It would be particularly inappropriate for the Commission to impose common-carrier regulations on FTTP broadband in the circumstances described herein because the Commission has not yet made any finding that there is any market failure to be addressed through regulation. As Chairman Powell has explained, government regulation is a "fundamental intrusion on free markets and potentially destructive, particularly where innovation and experimentation are hallmarks of an emerging market."[27] Accordingly, "[s]uch interference should be undertaken only where there is weighty and extensive evidence of abuse."[28] Imposing anticipatory regulations in the absence of such evidence is fundamentally destructive to the very innovation that the Commission and Congress have concluded will best serve consumers.

The relief Verizon is seeking here is nothing more than the Commission has already afforded to cable modem operators who, like Verizon, offer broadband services integrated with their video services. The mere fact that Verizon has historically been a telephone company regulated as a common carrier provides no basis for denying the requested relief. As the D.C. Circuit has noted, "[w]hether an entity in a given case is to be considered a common carrier" turns not on its typical status but "on the particular practice under surveillance."[29] And the FCC has already granted relief to cable under circumstances that parallel those at issue here.

For all these reasons, the FCC should issue a declaration confirming that the same regulatory treatment afforded to broadband services provided via cable also applies to broadband services provided via FTTP under the circumstances described here.

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[27] *See* Remarks of Michael K. Powell, Chairman, FCC, Silicon Flatirons Symposium, *The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age* at 4 (Feb. 8, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

[28] *Id.*

[29] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see also NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (finding it "logical to conclude that one can be a common carrier with regard to some activities but not others").

II. If Necessary, the Commission Should Grant Waivers or Forbearance for FTTP Broadband that Parallel the Waiver Previously Granted for Cable Modem Providers, at Least Until a Permanent Regulatory Framework for Broadband Has Been Established

If for any reason the Commission should determine that it is unable to grant the declaration requested above, or that such a declaration would not be adequate to enable Verizon to offer broadband via FTTP on the same terms as its cable competitors, then the Commission should grant such waivers or forbearance as may be necessary to provide interim relief until an appropriate regulatory framework for broadband has been established.

A. Granting an Interim Waiver Is Appropriate and Consistent with Commission Precedent

The Commission plainly has the authority to waive its own rules: "Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. The courts have made clear, however, that any waivers, such as the waiver previously granted to cable modem service, cannot be applied in a discriminatory fashion. Accordingly, waivers must be founded upon an "appropriate general standard," so that similar cases will receive similar treatment: "[s]ound administrative procedure contemplates waivers . . . granted only pursuant to a relevant standard . . . [which is] best expressed in a rule that obviates discriminatory approaches."[30] And in granting such a waiver, the Commission must "articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation."[31]

These judicially mandated principles of administrative consistency strongly support granting the waivers requested here because: (1) the Commission has *already* granted similar

[30] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[31] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *Industrial Broad. Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970)); *see WAIT Radio*, 418 F.2d at 1159.

relief to cable modem operators under parallel circumstances; and (2) the Commission has previously granted interim relief pending Commission consideration of new rules for a new service offering.

First, as noted above, FTTP broadband and cable modem service are closely analogous insofar as the absence of a need for regulation is concerned. The same special circumstances that led the Commission to waive key aspects of its common-carrier rules for cable modem service – namely, that these rules could stifle emerging facilities-based competition, undermine the goal of encouraging the deployment of advanced services, and burden new technologies with outdated regulatory categories – warrant similar treatment for the FTTP broadband services at issue here. Furthermore, as the Commission itself explained, "the core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which information service providers can gain access to their customers."[32] But the assumption of a one-wire-to-the-premises world does not apply to broadband services. Cable modem service is already available to nearly 90% of U.S. households; the incumbent cable companies obviously already have their own wires to their customers, as do electric utilities poised to offer broadband over power lines. Other intermodal broadband competitors do not even need a wire to the customer, since they rely on terrestrial wireless or satellite technologies.[33] And even aside from these various intermodal competitors, the Commission itself has previously found that incumbent LECs have no particular advantages over competitors when it comes to FTTP deployment.[34]

[32] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, ¶ 44 (internal quotation marks omitted).

[33] *See, e.g.*, *Wireline Broadband Classification Proceeding*, 17 FCC Rcd at 3054-57, ¶¶ 79-88.

[34] *See Triennial Review Order*, 18 FCC Rcd at 17143, ¶ 275 (noting that "competitive LECs are currently leading the overall deployment of [FTTP] loops," which "demonstrates that carriers are not impaired" without unbundled access to FTTP loops); *see also id.* at 17141-42,

Here, Verizon's FTTP deployment unquestionably will increase competition and consumer choice for broadband services, and for video as well. As previously noted, cable companies control about two thirds of the broadband mass market (and an even higher percentage of mass-market lines offering transmission speeds in excess of 200 kpbs in both directions).[35] The requested relief would increase competition by allowing Verizon to compete on the same terms as its cable competitors pending completion of the ongoing rulemakings. There is, therefore, no prospect of harm to competition from the interim relief requested here. And, as noted above, the Commission and the courts have repeatedly recognized that tariffing and cost-justification requirements can be *harmful* when imposed in a competitive market, because they not only impose burdens on carriers that attempt to make new offerings but also reduce or eliminate both the incentive and ability to discount prices in response to competition and to make efficient price changes in response to changes in demand and cost.[36] Accordingly, while the ongoing rulemakings proceed, there is no reason for extending to FTTP broadband the tariffing, cost-justification, and common-carrier rules that were designed for services provided over the narrowband telephone network as it existed decades ago.

Second, the Commission has previously granted similar interim waivers of regulatory requirements pending the adoption of permanent rules for a given service. For example, the

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¶ 272, 17145, ¶ 278, 17150, ¶ 290 & n.837; *USTA II*, 359 F.3d at 584 ("An unbundling requirement under these circumstances seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [FTTP] and ILECs fearful that CLEC access would undermine the investments' potential return. Absence of unbundling, by contrast, will give all parties an incentive to take a shot at this potentially lucrative market.").

[35] *See supra* note 25; *see also Triennial Review Order*, 18 FCC Rcd at 17135-36, ¶ 262 ("cable modem service is the most widely used means by which the mass market obtains broadband services," and "the gap between cable modem and ADSL subscribership continues to widen").

[36] *See supra* pp. 13-14.

Commission has ordered temporary waivers of certain price cap rules to "allow maintenance of the *status quo* until we have fully considered the issues related to the Broadband Proceeding [Docket No. 01-337]" – one of the very same broadband proceedings that may affect the regulation of FTTP broadband.[37] The Commission specifically concluded that the recalculation of price caps "during a period in which we are considering a modification of our rules that would obviate the need to include advanced services within the price cap indexes and rates, constitutes special circumstances [justifying an interim waiver], and such circumstances outweigh any harm to competition."[38] Precisely the same is true here.

B. Alternatively, the Requirements for Forbearance Pending Completion of the Ongoing Rulemakings Are Satisfied

To the extent that the Commission finds any statutory or other impediment to granting the requested declaration or waiver, it can and should forbear from enforcing that requirement.[39] The Commission has not just the power but the *duty*, under section 10 of the Communications Act, to forbear from enforcing Title II requirements if the Commission determines that: (1) the enforcement of such requirements is not necessary "to ensure that the charges, practices,

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[37] Order, *Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38 and 61.49 of the Commission's Rules*, 17 FCC Rcd 11010, 11012-13, ¶ 9 (2002) ("*Verizon Price-Cap Interim Waiver Order*"); *see also, e.g., See also* Order, *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, 19 FCC Rcd 7095, ¶ 8 (2004) (same, granting an extension of the temporary waiver); Report and Order and Second Further Notice of Proposed Rulemaking, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 19 FCC Rcd 4122, ¶ 10 n.40 (2004) ("all outstanding interim waivers of the all-or-nothing rule that depend on our decision in this proceeding shall continue in effect until we issue a final order on this issue"); Public Notice, *Wireless Bureau Outlines Guidance for Wireless E911 Rule Waivers for Handset-Based Approaches to Phase II Automatic Location identification Requirements*, 13 FCC Rcd 24609 (1998) ("The grant of interim waivers pending the adoption of permanent rule changes may [] be appropriate.").

[38] *Verizon Price-Cap Interim Waiver Order*, 17 FCC Rcd at 11012-13, ¶ 9 (2002).

[39] By contrast, if the Commission grants relief *without* invoking its forbearance authority under 47 U.S.C. § 160, then Verizon's conditional forbearance petition may be moot.

classifications, or regulations" for the carrier or service in question "are just and reasonable and are not unjustly or unreasonably discriminatory"; (2) enforcement of such requirements is necessary "for the protection of consumers"; and (3) forbearance is consistent with the public interest. 47 U.S.C. § 160.

The Commission has already tentatively concluded that forbearance from Title II regulation of cable modem service would satisfy all three requirements "because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."[40] The developing state of the market, the availability of competing facilities, and the negative impact on investment incentives that application of common-carrier regulations would entail all support interim regulatory relief for FTTP broadband just as they did for cable modem service. Indeed, the case here is stronger because local telephone companies serve a smaller share of the broadband market than cable companies, and deployment of FTTP, in particular, is just beginning.

Each of the three statutory requirements for forbearance is satisfied. As for the first requirement, the Commission has held that "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or unreasonably discriminatory."[41] Here, of course, FTTP deployment promote competition to cable for broadband services, but, in addition, it will promote competition to cable in its core video markets, thus bringing benefits to consumers on a variety of fronts. In any event, the Commission has repeatedly found that competition in broadband is robust; in the *Cable Modem Declaratory Ruling*, it noted that

[40] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.

[41] Memorandum Opinion and Order, *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) ("*Directory Assistance Order*").

"several rival networks providing residential high-speed Internet access are still developing."[42] Likewise, the D.C. Circuit emphatically "agree[d] with the Commission that robust intermodal competition from cable providers . . . means that even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs."[43] Given the pressure of cable modem and other competitors, there is no plausible claim that Verizon could charge unjust or unreasonable prices, or engage in unjust or unreasonable practices.[44]

As for the second forbearance requirement, competition also ensures that common-carrier regulations are not "necessary for the protection of consumers." Instead, the opposite is true: consumers are best protected by allowing the marketplace to provide them with a robust choice of services from a variety of competing providers. Indeed, the Commission has noted that "the fundamental objective of the 1996 Act is to bring consumers of telecommunications services in

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[42] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.

[43] *USTA II*, 359 F.3d at 582.

[44] Moreover, even in a *different* case where the combination of intermodal competition and other alternatives were *not* present to ensure competitive rates in the near term, the Commission nonetheless would be entitled to balance any potential short term risks against the longer term benefits of promoting investment in and accelerating deployment of innovative services at reasonable rates. Indeed, the Commission has squarely held that such short-term effects impose no bar to forbearance where, "*on balance*, the pro-consumer benefits of [forbearance] . . . outweigh any potential competitive advantage that may accrue to [the carrier requesting forbearance]." *Directory Assistance Order*, 14 FCC Rcd at 16277, ¶ 44. The D.C. Circuit likewise made this same point in upholding the Commission's *Triennial Review Order*, when it noted that even if the Commission's judgment resulted in some "increas[e] [in] consumer costs today in order to stimulate technological innovations" to benefit consumers tomorrow, "there is nothing in the Act barring such trade-offs." *USTA II*, 359 F.3d at 581. The D.C. Circuit had previously concluded that this principle extends to determining what policies will best promote deployment of innovative services at reasonable rates. *See Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 301-03 (D.C. Cir. 2003) (upholding the Commission rule that required all televisions of a certain size to include a DTV tuner, notwithstanding the fact that some consumers would have to pay more for a feature they do not need).

all markets the full benefits of competition."[45] Here, FTTP deployment will help to protect consumers by providing increased competition to cable, both in broadband and in cable's core video market. Moreover, FTTP can be expected to facilitate the creation of new, feature-rich services for consumers. And, the Commission has already tentatively concluded in the cable modem context "that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers," even though cable modem service today accounts for the lion's share of the broadband mass market.[46]

As for the third requirement, in determining whether forbearance is "in the public interest," the Commission must again consider whether forbearance will promote competitive market conditions and benefit consumers. And, once again, FTTP deployment serves the public interest by bringing increased competition to cable not only in broadband services but also in video services. In the presence of increased, facilities-based competition, reliance on market forces to set the terms and conditions of service is in the public interest, while heavy-handed, asymmetric common-carrier regulation would actually harm competition and consumers.[47] For confirmation of this principle, one need look no further than the Commission's own *Computer II* decision, which recognized that "the very presence of Title II requirements inhibits a truly competitive, consumer responsive market."[48] Moreover, regulation adds costs to local telephone

[45] *Directory Assistance Order*, 14 FCC Rcd at 16277-78, ¶ 46; *see also* Recommended Decision, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 6153, App. A, 6195 (2000) ("Consumers are and should be the ultimate beneficiary of the 1996 Act.").

[46] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.

[47] *Cf.* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, 11 FCC Rcd 15499, 15812, ¶ 618 (1996) (local competition rules should be, as "Congress intended, *procompetition*" rather than "*pro-competitor*").

[48] *Computer II*, 77 F.C.C.2d at 425-26, ¶ 109; *see also supra* pp. 13-14 (noting previous Commission findings that imposition of tariffs in a competitive environment affirmatively harms competition).

company provision of broadband services, and the Commission has found that the avoidance of unnecessary cost is also in the public interest.[49] This is especially true where, as here, the Commission has not yet considered the appropriate regulatory framework for a new service and has made no finding that the regulations in question would serve any purpose with respect to FTTP broadband. Just as in the cable modem context, "forbearance would be in the public interest because [FTTP] is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."[50]

Accordingly, to the extent that forbearance is needed in order to provide the requested interim regulatory relief, the conditions for forbearance are amply satisfied with respect to the FTTP services at issue here.

Conclusion

For all the foregoing reasons, the Commission should grant the requested relief pending completion of its ongoing broadband rulemakings, either by issuing a declaration confirming that the FTTP broadband services at issue here are subject to the same regulatory treatment afforded to cable modem service in the *Cable Modem Declaratory Ruling*, or by granting a waiver or forbearance to the extent necessary.

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[49] *See Computer II*, 77 F.C.C.2d at 425-26, ¶ 109.

[50] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.

Respectfully submitted,

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Counsel for the Verizon Telephone Companies

June 28, 2004

Exhibit A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)
	)
Petition of Verizon for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber To The Premises	))))
	)
Conditional Petition of Verizon for Forbearance Under 47 U.S.C. § 160(C) with Regard to Broadband Services via Fiber To The Premises	))))

DECLARATION OF ANTHONY ZECHA

1. My name is Anthony Zecha. I submit this declaration, in support of the above-referenced petitions, to explain generally how Verizon will provide video programming and broadband services. Unless otherwise indicated, I have personal knowledge of the facts presented herein and, if called upon to do so, I could testify competently thereto.

2. I am a full-time employee of Verizon Services Corporation ("Verizon"). My position is Director – Video and Advanced Services Technologies in Verizon's Technology Organization. In that capacity, I oversee the specification of the functional performance parameters of the Verizon video platform, the definition of the video network architecture, and the management of the development, integration, testing and deployment of the end-to-end video system.

3. Verizon plans to provide broadband transmission service in conjunction with multichannel video programming over a fiber-to-the-premises ("FTTP") network, without relying on the copper loops of the traditional telephone network. In connection

with this video offering, Verizon is seeking to obtain franchises from local franchising authorities.

4. The principal video components of the network are: (a) a video "super headend," which performs content aggregation on a national or regional basis, (b) a video hub office, which acts as a local (or metropolitan area) aggregation and insertion point for local content, (c) a video serving office, which supports a given subscriber base of video customers (d) a passive optical network (PON), which distributes the video signal to subscribers over a local fiber access network and (e) customer premises equipment, such as set top boxes.

5. Here is a simple example of how video transmissions are carried over Verizon's proposed network: A video super head-end receives video content, typically from satellite sources, and encodes the content into standard MPEG2 format. Similar to existing cable systems, the video content is then transported to local markets and delivered to one or more video hub offices within a given market area. A video hub office can serve multiple communities within a geographic area. The video hub offices are responsible for inserting off-air local channels as well as public, education and government channels. Other functions, such as interactive program guides and video on demand are also supported at these locations. The optical video signals, including local content and programming, are then delivered to Verizon's video serving offices (wire centers).

6. A video serving office (wire center) is connected to a subscriber's premises by a passive optical network (PON) and associated electronics. At the video serving office, the optical video signal is combined with optical voice and high speed data signals, and sent

to the subscriber. At the subscriber premises, an optical network terminal (ONT) device terminates this combined optical signal and separates the video from the voice and data services. It also converts the optical video signal to standard cable TV electrical signals to allow the subscriber to use standard, in-home coaxial wiring to connect customer premises equipment, such as set top boxes.

7. Verizon's planned PON will use three light beams, each of which will have a role in Verizon's video offering. One of the three beams will be devoted to downstream video delivery; the second beam will carry voice, data and instructions upstream from the customer and will be used for controlling various video features; the third beam will carry voice, data, video-on-demand programming, and certain niche video channels downstream to the customer.

I declare under penalty of perjury that the foregoing is true and correct.

June __, 2004

____
Anthony Zecha

Exhibit B

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc.:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.